

Before the
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of

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Auction for Direct Broadcast
Satellite Services Licenses

AUC-03-52

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To: The Commission

NOV 10 2005

Opposition to Petition for Reconsideration

Federal Communications Commission
Office of Secretary

Dominion Video Satellite, Inc. ("Dominion"), by its attorneys, hereby submits its Opposition to the Petition for Reconsideration filed by EchoStar Satellite LLC ("EchoStar") on May 20, 2005 in the above captioned proceeding.¹ For the reasons stated below, Dominion urges the Federal Communications Commission ("FCC") to deny EchoStar's request that the FCC reconsider and delete the restriction that limits applicants for Direct Broadcast Satellite ("DBS") channels 23 and 24 at 61.5° W.L. to those that do not currently operate DBS satellites at orbital locations capable of providing service to the 50 U. S. states.²

I. The Parties

Dominion is a DBS pioneer, the last remaining applicant from the original DBS round in 1981. It is the licensee of eight channels at 61.5° W.L. Dominion established due diligence for its eight channels through a lease with EchoStar for

¹ The *Petition for Reconsideration* filed by EchoStar Satellite, L.L.C. appeared in the Federal Register on October 26, 2005. Dominion's opposition is being timely filed on November 10, 2005, pursuant to the requirements of the relevant October 26 Public Notice and 47 C.F.R. 1.429(f).

² Dominion notes that the U.S. Court of Appeals for the District of Columbia Circuit recently vacated Part IIIA of the *DBS Auction Order* and remanded the matter to the Commission for further consideration. See *Northpoint Technology, LTD and Compass Systems Inc. v. FCC*, No.04-1052, slip op.(D.C. Cir. June 21, 2005).

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sufficient transponder capacity. The negotiation for the lease arose out of the FCC's grant to EchoStar of eleven channels at 61.5° W. L. and EchoStar's prior determination to construct a satellite with sufficient capacity to broadcast the frequencies assigned to Dominion. Dominion operates two of its licensed channels and has subleased the remaining six channels back to EchoStar.

Dominion now seeks to construct and operate its own satellite, and if it receives authorization for the two unassigned channels, those channels would be provided for on the future DBS satellite. Dominion is presently in discussions with Orbital Science on technical updates to its previous planned satellite.

In addition to its initially assigned eleven channels at 61.5°, EchoStar has acquired the eleven channels at 61.5° previously licensed to Rainbow DBS Company, LLC. ("Rainbow"). EchoStar also operates DBS channels at 110°, 119° and 148°. EchoStar is the largest licensee of DBS spectrum. It operates at orbital locations capable of providing service to the 50 U. S. states. Under the current restriction on the assignment of the two channels at 61.5°, EchoStar is not an eligible applicant.

II. RAINBOW'S DEPARTURE FROM THE DBS MARKET DID NOT ALTER THE CIRCUMSTANCES UNDERPINNING THE COMMISSION'S ORDER

The unique circumstances supporting the FCC's decision to impose eligibility restrictions on the two unassigned DBS channels at the 61.5° W.L. orbital position have not changed. In its *Petition for Reconsideration*, EchoStar characterizes Rainbow's decision to terminate the VOOM DBS ("VOOM") service as a

fundamental change in circumstances, even though VOOM served only a small percentage of overall DBS subscribers.³ VOOM's departure from the market does not call for the removal of the eligibility restrictions, but instead requires the FCC to maintain the restrictions because VOOM's demise is a set-back for competition in DBS. This change enhances the public's need for additional competition. Introducing new competition and developing innovative services are even more important now that one less provider serves the DBS market. Thus, the Commission's strategies for enhancing DBS competition, including limiting participation in the 61.5° W.L. auction, should not be sacrificed, but instead should be embraced and vigorously pursued.

Despite Petitioner's contention that Rainbow offered the only viable chance to introduce new DBS competition, Dominion is positioned to use the two channels available at 61.5° to enhance competition and serve the public interest. As previously stated, Dominion is in active negotiations to construct and operate its own satellite and to comply with the FCC's due diligence requirements with regard to the two channels for assignment at 61.5°. If EchoStar and DIRECTV are allowed to participate in the auction, however, Dominion will almost certainly be precluded from obtaining the channels, because both companies have vastly greater financial resources and a strong interest in taking the channels off the market in order to secure their dominant positions. Dominion, and potential new entrants into the DBS market, should at a minimum be given the opportunity to provide the "greater

³ *Petition for Reconsideration* filed by EchoStar Satellite, L.L.C., in re Auction for Direct Broadcast Satellite Service Licenses, AUC-03-52 (May 20, 2005).

price competition...new services and technological innovations" envisioned by the FCC when it created the parameters for participation in the 61.5° W.L. auction.⁴ That rare opportunity will only be available if the Commission adheres to its stated "principal goal" of enhancing the possibility that an additional DBS provider can emerge.⁵

III. REMOVAL OF THE AUCTION ELIGIBILITY RESTRICTIONS WILL IMPAIR THE GROWTH OF NICHE PROGRAMMING

In its 61.5° Eligibility Order, the FCC said if the "channels are ultimately used to provide a specialized or niche service that becomes a complement to other DBS services, rather than as part of a service that duplicates all the programming of other services providers, such use would be in the public interest."⁶ Dominion is a niche DBS provider that has responded to the public's and Congress's call for a family friendly alternative at a reasonable cost and thus serves a substantial public interest. Small providers can immediately offer niche programming valuable to underserved subscribers and beneficial to the public interest.

Dominion, for example, offers unique programming and serves minority populations ignored or neglected by larger licensees. Dominion provides a variety of program services to its subscribers who are primarily seeking Christian and family-friendly content. Dominion is the only satellite provider that has created its own 24-hour educational children's channel and also offers programs directed to minority groups including American Indians, 24-hour music video channels for

⁴ *In the Matter of Auction of Direct Broadcast Satellite Licenses*, AUC-03-52, FCC 04-271 (released Dec. 3, 2004), 70 Fed Reg. 20,479 (Apr. 20, 2005) at ¶17.

⁵ *Id.* at ¶ 23.

⁶ *Id.* at ¶ 27.

teens that provide positive messages, and educational programming. Dominion has also initiated a family-friendly package of programming services such as FOX News, Hallmark channels, and others. The ability of Dominion and others to create or expand similar niche services, however, requires that companies other than EchoStar and DIRECTV have a realistic opportunity to bid on channels 23 and 24 at 61.5° W.L. The opportunity to make these valuable licenses available to a wide variety of applicants and to avoid additional concentration of DBS licenses will disappear overnight if the FCC lifts the participation prohibitions it wisely implemented for the 61.5° W.L. auction.⁷

IV. REMOVAL OF THE AUCTION ELIGIBILITY RESTRICTIONS WILL INHIBIT COMPETITION AND SLOW INNOVATION

As the Commission has correctly observed, the two channels at 61.5° W.L. are unique because they are the last unassigned U.S. DBS channels in the 12 GHz band that have a sufficient look angle to provide service to the eastern United States.⁸ Additionally, Dominion has found that the 61.5 ° satellite location serves extremely well the entire continental United States, as far as Washington State; indeed, the State of California ranks number two in subscriptions for the Sky Angel service. Given the limited spectrum resources available for DBS service, these channels are particularly vital to increasing the competitive options available to DBS and MVPD subscribers. Furthermore, DIRECTV and EchoStar already have sufficient

⁷ See Section 309(j)(3)(B) of the Communications Act requiring the Commission to avoid "excessive concentration of licenses" and the dissemination of "licenses among a wide variety of applicants."

⁸ Id at ¶15.

spectrum to succeed in the marketplace and thus granting channels 23 and 24 to either company would not serve the public interest.

Without access to the eastern United States, even the best financed, most skilled, most technologically innovative new entrant will be unable to enter the market in a meaningful manner. The Commission should not rely on EchoStar's speculation that it is "unlikely" that another DBS provider will launch a satellite into the 61.5° W.L. orbital location, but should instead allow the auction process to work as intended. Should the Commission alternatively decide to open the auction to DIRECTV and EchoStar, it will foreclose an exceptional opportunity to promote enhanced DBS competition.

V. CONCLUSION

For the foregoing reasons, Dominion respectfully asks the Commission to maintain the eligibility restrictions imposed in the *61.5° W.L. Eligibility Order*.

November 10, 2005

Respectfully submitted,


/s/

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CERTIFICATE OF SERVICE

I, Reginal Leichty, an attorney at Holland & Knight LLP, hereby certify that copies of the foregoing Petition for Reconsideration were sent on November 10, 2005, via first-class mail, postage prepaid, to the following:

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